OAH 8-3000-30255
OAH 8-3000-30265

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition of Steele County for a Declaration that the December 14, 2012 Deadline Imposed by the Minnesota Department of Transportation for an Agreement Regarding Turnback of TH 14 Is an Unadopted Rule.

In the Matter of the Petition of Waseca County for a Declaration that the December 14, 2012 Deadline Imposed by the Minnesota Department of Transportation for an Agreement Regarding Turnback of TH 14 Is an Unadopted Rule.

ORDER

On December 19, 2013, Steele and Waseca counties (the Counties) petitioned this Office for issuance of an Order under Minn. Stat. § 14.381. The Counties sought an Order directing the Minnesota Department of Transportation (Department or MnDOT) to refrain from enforcing certain interpretations of Minn. Stat. §§ 161.081 and 161.16 as though they were duly adopted rules.

Justin P. Weinberg and Peter J. Hemberger of Gislason & Hunter LLP, appeared on behalf of Petitioners Steele and Waseca Counties. Stephen D. Melchionne, Assistant Attorney General, appeared on behalf of the Department. An oral argument on the petitions occurred on Thursday, February 12, 2013.

Based upon all of the filings by the parties, and for the reasons set out in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The Petitions are **DISMISSED WITH PREJUDICE** to refiling.

2. Pursuant to Minn. Stat. § 14.381, subdivision 3, Department may recover 40 percent of the costs of this proceeding from Steele County and 40 percent of the costs from Waseca County.

Dated: March 26, 2013

ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44 and 14.45.

MEMORANDUM

Pursuant to Minn. Stat. § 14.381, subd. 1(a), a person may petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that "an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule."

At issue in these proceedings is whether MnDOT's establishment of a firm deadline to complete a written agreement to transfer and refurbish certain roadways amounts to an unadopted rule.

The Administrative Law Judge concludes that neither the establishment of a deadline to complete negotiations on the agreement, nor the Department's conditioning disbursement of certain highway funds on the completion of such a writing, is an unadopted rule. Accordingly, dismissal of the petitions is the appropriate result.

Factual Background

In 1921, the Commissioner of MnDOT issued an order designating as a Trunk Highway a series of county roads, including roads within Steele and Waseca Counties.

In 1999, MnDOT completed a study which considered various options for reconstructing or realigning Trunk Highway 14 (TH 14).

In 2007, representatives of MnDOT and the Counties met to discuss a new alignment of the highway and turning back portions of the Trunk Highway to county supervision. Following a "turnback," the costs of maintaining these roads would be borne by the Counties. Integral to these discussions were the amounts of state aid that would be available to refurbish these roads and the timetable for the transfer.

State and county officials were not able to come to agreement as to the features of the turnback agreement.

On November 16, 2011, MnDOT sent to Steele County a notice regarding the impending release of portions of Old TH 14 to Steele County.[1]

[1] *See,* Affidavit of Mark Trogstad-Issacson, Exhibit A.

On the same day, MnDOT sent to Waseca County a notice regarding the impending release of other portions of Old TH 14 to Waseca County.[2]

Notwithstanding these notices, the exact date of the turnback and release of the Old TH 14 to the Counties was revised several times. The original release date was planned for July of 2012. This was later adjusted to the completion date for New TH 14.

New TH 14 was opened on August 31, 2012. The date for turnback and release of the roadway was moved to October 1, 2012, and later to October 31, 2012. In each instance, these adjustments were made so as to permit the parties more time to negotiate a mutually-acceptable turnback agreement.[3]

Before the October 31, 2012 release date, the Counties filed petitions with this Office asserting that an October 31, 2012 deadline was an unadopted rule, and that MnDOT did not have authority to release Old TH 14 without a turnback agreement in place. Without conceding that point, MnDOT agreed to move the deadline to December 14, 2012 in return for the Counties' withdrawal of their petitions.[4]

By December 18, 2012, both Steele and Waseca Counties had rejected MnDOT's then-most recent proposal for a turnback agreement.[5]

On December 19, 2012, MnDOT served a notice of release on the County Highway Department and the County Auditor. The notice effectuated a turnback of Old TH 14 as of that date.[6]

In their second petition for relief from this Office, the Counties assert that: (1) MnDOT is without the authority to turnback portions of the Trunk Highway absent an agreement with the Counties; and (2) MnDOT did not have the power to set December 19, 2012 – or any other date – as a deadline to complete a turnback agreement.[7] Without such powers, continue the Counties, MnDOT's efforts to bring the negotiations to a close amounted to the issuance of unadopted rules.

As detailed below, however, neither claim has merit.

---

[2] *See,* Affidavit of Steven Kirsch, Ex. A.

[3] *See,* Affidavit of Gordon Regenscheid, Exs. B and C.

[4] *See,* Affidavit of Stephen Melchionne, Ex. D.

[5] *See generally,* Findings of Fact, Conclusions of Law and Order, *County of Steele v. Minnesota Dep't of Transp.,* Docket No. 74-CV-12-2638 (Minn. Dist. Ct., 3d Dist., 2012).

[6] *See,* Affidavit of G. Regenscheid, Exs. D and E.

[7] *See e.g.,* Petition of Steele County, at ¶ 15.

Analysis

1. The Commissioner Has Plenary Authority to Effect Turnbacks

The Commissioner of Transportation has broad authority to adjust the routes of Trunk Highways within the State of Minnesota. Minn. Stat. § 161.16 provides that while an agreement with local officials is the preferred method of effecting such changes, in the final analysis, the Commissioner may designate the features of the Trunk Highway by way of an administrative order. The statute provides in part:

> Subd. 2. Designation and location by order. The commissioner shall by order or orders designate such temporary trunk highways, and on determining the definite location of any trunk highway or portion thereof, the same shall also be designated by order or orders. The definite location of such highway or portion thereof may be in the form of a map or plat showing the lands and interests in lands required for trunk highway purposes. Formal determination or order if by map or plat, shall be certified by the commissioner of transportation on said map or plat. The commissioner may, by similar order or orders, change the definite location of any trunk highway between the fixed termini, as fixed by law, when such changes are necessary in the interest of safety and convenient public travel. The commissioner shall maintain a file of these orders as permanent records.
>
> ....
>
> Subd. 4. (a) If the commissioner makes a change in the definite location of a trunk highway as provided in this section, the portion of the existing road that is no longer a part of the trunk highway by reason of the change and all right, title, and interest of the state in the trunk highway shall revert to the road authority originally charged with the care of that trunk highway unless the commissioner, the road authority originally charged with the care of the trunk highway and the road authority of the political subdivision in which the portion is located agree on another disposition, in which case the reversion is as provided in the agreement. When the reversion is to a county and a portion lies partly within a city of under 5,000 population the entire portion shall revert to the county if it meets the criteria for a county state-aid highway.
>
> (b) If the portion had its origin as a trunk highway, it shall become a county highway unless it lies within the corporate limits of a city, in which case it shall become a street of the city. When the existing road that is no longer a part of the trunk highway by reason of the change lies within a city of less than 5,000 population, the portion shall revert to the county if the portion meets the criteria for a county state-aid highway. In municipalities of over 5,000 population that portion of the road may revert

> to the county if the appropriate authorities of the state, county and the various cities through which the route passes so agree. Should any city not agree that the portion of the roadway that passes through it shall revert to county jurisdiction, the portion shall not so revert, although the other portions of the roadway in which agreement has been reached shall revert to county jurisdiction. Notwithstanding the other provisions of this chapter or other applicable laws and rules, the commissioner may convey and quitclaim to a county, city, or other political subdivision all or part of the right-of-way of the existing road that is no longer a part of the trunk highway by reason of the commissioner's order or orders. The conveyance shall be for highway purposes, and the future cost of maintenance, improvement, or reconstruction of the highway and the contribution of that highway to the public highway system is reasonable and proper consideration for the conveyance. This subdivision shall apply to all trunk highways reverted before May 29, 1967.[8]

The authority to designate the features of the state trunk highway system, memorialize the designated roadways in official maps and trigger the automatic reversion of abandoned roadways to local jurisdiction, all confirm the Commissioner's broad powers in this area.

The Counties' contrary position is that the Commissioner may not transfer portions of the Trunk Highway system back to county supervision without the county's consent. Given the breadth of Minn. Stat. § 161.16, this view is not well taken.

Likewise important to this case, certain state highway funds are available for refurbishment and repair of roadways that are turned back to local jurisdiction. In Minn. Stat. § 161.081, the Legislature established the "flexible highway account" and prioritized the uses of monies in that account for "restoration of former trunk highways that have reverted to counties." Additionally, this statute directs the Commissioner to prioritize the various projects competing for funds from this account, and to apportion amounts as provided in the statute, by conferring with local officials and completing turnback agreements. The statute provides in part:

> Subd. 3. Flexible highway account; turnback accounts. (a) The flexible highway account is created in the state treasury. Money in the account shall be used:
>
> (1) in fiscal years 2009 and 2010, 100 percent of the excess sum, as calculated in paragraph (i), and in fiscal years 2011 and thereafter, 50 percent of the excess sum, as calculated in paragraph (i), for counties in the metropolitan area, as defined in section 473.121, subdivision 4, but for the purposes of the calculation cities of the first class will be excluded in the metropolitan area; and

[8] Minn. Stat. § 161.16 (emphasis added).

(2) of the amount available in the flexible highway account less the amount under clause (1), as determined by the commissioner under this section for:

(i) restoration of former trunk highways that have reverted to counties or to statutory or home rule charter cities, or for trunk highways that will be restored and subsequently turned back by agreement between the commissioner and the local road authority;

(ii) safety improvements on county highways, municipal highways, streets, or town roads; and

(iii) routes of regional significance.

(b) For purposes of this subdivision, "restoration" means the level of effort required to improve the route that will be turned back to an acceptable condition as determined by agreement made between the commissioner and the county or city before the route is turned back.

(c) The commissioner shall review the need for funds to restore highways that have been or will be turned back. The commissioner shall determine, on a biennial basis, the percentage of funds in the flexible highway account to be distributed to each district, and within each district the percentage to be used for each of the purposes specified in paragraph (a). Money in the account may be used for safety improvements and routes of regional significance only after money is set aside to restore the identified turnbacks. The commissioner shall make these determinations only after meeting and holding discussions with committees selected by the statewide associations of both county commissioners and municipal officials. The commissioner shall, to the extent feasible, annually allocate 50 percent of the funds in the flexible highway account to the department's metropolitan district, and 50 percent to districts in greater Minnesota.[9]

After having completed his consultations, and with that year's set of turnback agreements in place, the Commissioner is able to apportion the funds in the flexible highway account according to the different purposes specified in the statute.

2. The Decision to Turn Back Portions of Former Trunk Highway 14 to Waseca and Steele Counties Did Not Result in Rulemaking.

The Minnesota Administrative Procedure Act (MAPA) defines a "rule" as:

[9] Minn. Stat. § 161.16 (emphasis added).

> every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[10]

Further, those interpretations of existing rules which "make specific the law enforced or administered by the agency," and are not either long-standing positions of the agency or within the plain meaning of the statute, are deemed to be "interpretative rules."[11] Like substantive rules, an agency's interpretative rules are valid only if they are promulgated in accordance with MAPA.[12]

In this case, however, the Commissioner did not establish a new rule when he issued his December 19, 2012 Order. This is because Minn. Stat. § 161.16 gives him the power to issue orders that "change the definite location of any trunk highway between the fixed termini, as fixed by law, when such changes are necessary in the interest of safety and convenient public travel." Moreover, the Commissioner may issue such orders notwithstanding the other provisions of Chapter 161 "or other applicable laws and rules," and "convey and quitclaim to a county, city, or other political subdivision all or part of the right-of-way of the existing road that is no longer a part of the trunk highway by reason of the commissioner's order or orders."[13] These actions, undertaken pursuant to Minn. Stat. § 161.16, do not amount to new rulemaking.[14]

3. MnDOT's Selection of December 19 as a Turnback Date for Old Trunk Highway 14 Did Not Result in Rulemaking.

The counties assert that to the extent that the Commissioner selected December 19, 2012 as the effective date for the turnback order, without the Counties' concurrence, this action amounted to rulemaking.

Even if it could be agreed that the designation of the effective date of the turnback order was "adopted to make specific" MnDOT's administration of Minn. Stat. § 161.16, this determination would still not qualify as a new rule. This is because the

---

[10] Minn. Stat. § 14.02, subd. 4.

[11] *See, e.g., Mapleton Community Home, Inc. v. Minnesota Dep't of Human Services,* 391 N.W.2d 798, 801 (Minn. 1986) ("[a]n agency interpretation that 'make[s] specific the law enforced or administered by the agency' is an interpretive rule that is valid only if promulgated in accordance with the [Minnesota Administrative Procedures Act]" (quoting *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979)).

[12] *See, In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. App.), *review denied* (Minn. 1993) (*citing, Mapleton Community Home,* and *Minnesota-Dakotas Retail Hardware Ass'n, supra*).

[13] Minn. Stat. § 161.16, subds. 2 and 4(b).

[14] The appellate courts have instructed that every executive branch agency has the "flexibility and discretion to depart from formal rulemaking" when application of a given legal standard to a particular set of facts seems clear. *See e.g., AAA Striping Service Co. v. Minnesota Dep't. of Transp*, 681 N.W.2d 706, 717-18 (Minn. 2004); *L&D Trucking v. Minnesota Dep't. of Transp*., 600 N.W.2d 734, 736 (Minn. App. 1999); *In re Hibbing Taconite Co*., 431 N.W.2d 885, 894-95 (Minn. App. 1988).

turnback of particular portions of the former Trunk Highway 14 is not a "statement of general applicability." Not every trunk highway of the state was turned back to County jurisdiction on December 19; and, after this particular transfer was complete, no part of the roadway remained under state jurisdiction. Thus, far from being a generally applicable matter of state regulation, the Commissioner's selection of a particular Wednesday in December for the effective date of his Order is significant only in this instance. It was not a rule under Minn. Stat. § 14.02, subd. 4.

4. Conditioning Access to the Flexible Highway Account Upon the Completion of a Turnback Agreement is Not an Unadopted Rule.

Refurbishing and maintaining the former roadways of TH 14 is likely to be an expensive undertaking for the Counties.

Adding to the Counties' discomfiture is MnDOT's claim that state funds to complete the repairs only follow from a completed turnback agreement. MnDOT maintains that unless there is a turnback agreement in place before the effective date of the transfer, the Counties are not eligible to access monies in the flexible highway account for repair of the transferred roads.

The Counties assert that MnDOT's position during the turnback negotiations was "take it, or leave it" – "take" the proposed turnback agreement as it was drafted by the agency or "leave" as inaccessible money from the flexible highway account. The Counties maintain that MnDOT's position that a pre-turnback agreement is required in order to access monies in the flexible highway account is an unadopted rule.

The Administrative Law Judge disagrees. The Commissioner's interpretation of Minn. Stat. § 161.081 does not amount to new rulemaking because it follows from a plain reading of the statute. In two places, the statute limits the eligibility of turnback projects for funding from the flexible highway account to those projects that had agreements in place before the roadways reverted back to local supervision. In the first reference, the statute grants eligibility to those projects where a turnback agreement is in place and the roadways are "restored and subsequently turned back." Thus, the regular order of events is: agreement between MnDOT and local officials; roadway restoration; followed by a transfer of responsibility. The second statutory reference is clearer still. It limits eligibility for funding as "determined by agreement made between the commissioner and the county or city before the route is turned back."

To limit the eligibility for flexible highway account funds to those projects that had a turnback agreement "before the route is turned back," does not announce a new rule. This is the limitation that is provided by Minn. Stat. § 161.081.

5. Because the Petitions Were Filed in Good Faith, the Department Should Bear Some, But Not All, of the Cost of the Proceedings.

Minn. Stat. § 14.381, subdivision 4 directs that the agency should bear the costs of the proceedings undertaken to review of the petitions. However, this same subdivision permits the agency to recover its costs, when, in cases such as this, it prevails on the merits of the dispute. The reviewing judge is to assess the challenging parties' ability to pay, and their good faith in making the original challenge, when apportioning the costs of the proceedings.

Because the Counties had a good-faith and substantive belief that MnDOT was violating MAPA, even if that view was not correct, they should not bear the entire cost of these proceedings.

For these reasons, the most appropriate result is to dismiss the Petitions and to apportion 40 percent of the costs to Steele County and 40 percent of the costs to Waseca County.

E. L. L.